UNITED STATE OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Firtline Transportation Security, Inc.

Employer,

-and- **Case 17-RC-12354**

International Union, Security, Police,
and Fire Professionals of America (SPFPA)

Petitioner.

_____/

PETITIONER SPFPA'S BRIEF ON REVIEW

I. Introduction

Petitioner, International Union, Security, Police, and Fire Professionals of America (SPFPA), incorporates by reference its earlier statement in opposition to review. Petitioner also expresses complete agreement with Member Liebman's dissenting opinion in Firstline Transportation Security, Inc., 344 NLRB No. 124 (June 30, 2005). This brief argues two further reasons for the Board taking jurisdiction in this case. First, the history of Section 9(b)(3) of the Act and long-established Board policy strongly support the Board's exercise of jurisdiction under the Act over security screeners. Second, the Board is not the appropriate Executive Branch entity to exclude security screeners from collective bargaining on the basis of national security.

II. History Related to Section 9(b)(3) of the Act, and the Board's Long-Established Policy of Exercising Jurisdiction Over National Defense Work, Strongly Support The Exercise of Board Jurisdiction Over Security Screeners.

The Primary issue is not whether the Board should prohibit security screeners from organizing collectively and selecting representatives for the purposes of engaging

in collective bargaining. Such is a "fundamental right" that precedes and transcends the Act, see International Union, U.A.W.A., AFL Local 232 v. Wisconsin Employment Relations Act, 336 US 245, 259 (1948) ("The right to strike, because of its more serious impact upon the public interest, is more vulnerable to regulation than the right to organize and selection representatives for lawful purposes of collective bargaining which this Court has characterized as a 'fundamental right' and which, as the Court has pointed out, was recognized as such in its decisions long before it was given protection by the National Labor Relations Act"). Rather, the issue in this case is more limited: whether the Board will exercise its jurisdiction under the Act to regulate collective bargaining by security screeners and their union[s]. History related to Section 9(b)(3) of the Act[1], and the Board's long-established policy of exercising jurisdiction over private employers engaged in national defense activities, strongly support the Board's exercise of jurisdiction in this case.

In 1947, shortly before enactment of Section 9(b)(3), through the Taft-Hartley amendments to the Act, the Supreme Court confirmed the employee status of proprietary guards, who had been militarized by induction into auxiliary service units in World War II. NLRB v. E. C. Akins & Co., 331 US 398 (1947). The Court took judicial

---

[1] Section 9(b)(3), *29 USC § 159(b)(3), states:*

§ 159. Representatives and Elections
***

(b) Determination of bargaining unit by Board. The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act [29 USCS §§ 151-158, 159-169], the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivisions thereof: Provided, That the Board shall not . . .(3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

notice of a circular issued under the authority of the Secretary of War. According to the circular, the functions of the civilian auxiliaries to the military police were "(1) to provide internal and external protection of the plant against sabotage, espionage, and natural hazards; (2) to serve with the army in providing protection to the plant and its environs in emergency situations." 331 US at 407. The right of the guards to bargain collectively was recognized by the circular: "Auxiliary Military Police are permitted to bargain collectively, but no such activity will be tolerated which will interfere with their obligations as members of the Auxiliary Military Police." 331 US at 409.[2]

In NLRB v. Jones & Laughlin Steel Corp., 331 UC 416 (1947), a case contemporary with Atkins, the Supreme Court upheld a Board order requiring the employer to recognize, as bargaining representative of a unit of militarized proprietary guards, a union that also represented the employer's production workers at the same location.

Congress took sharp exception to the Jones & Laughlin decision, and addressed the matter in what developed into the 1947 Taft-Hartley amendments to the Act.

The original House version of the Taft-Hartley amendments would have removed guards from the protection of the Act altogether. This would have been achieved by amending the Act's definition of "supervisor" to include guards. HR3020, 80th Cong., 1st Sess., § 2(12)(B)(1947). The House passed this initial version of the legislation motivated by a concern for divided loyalty. *Ibid.*

In contrast to the changes proposed by the House, the original Senate bill would have preserved the status quo, as it offered no provisions dealing with guards. See S.

[2] In representation cases decided during the World War II era, the Board certified various bargaining unit of militarized proprietary guards. See P.H. Hanes Knitting Co., 52 NLRB 746 (1943); Dravo Corp., 52 NLRB 322 (1943); Gibbs Gas Engine Co., 55 NLRB 492 (1944).

1126, 80th Cong., 1st Sess. (1947). But with the passage of the House version, and after the Supreme Court's handling of Jones & Laughlin, the Senate recognized a need for action while Taft-Hartley was in conference.

The question confronting the Senate was how to accommodate the issue of divided loyalties without denying guards their rights as employees under the Act. This lead to a compromise between the House and the Senate conferees, the formulation that is now Section 9(b)(3). The Board's practice of placing guards in separate bargaining units was codified in the first part of Section 9(b)(3). In direct response to the problem of divided loyalty that arises when guard employees and non-guard employees belong to the same union, the compromise barred the Board from certifying as a representative of guards any union that admits non-guards to membership or is directly or indirectly affiliated with another union admitting such employees, in the second part of Section 9(b)(3). As Senator Taft explained:

> [A]s to plant guards, we provided that they could have the protection of the Wagner Act only if they had a union separate and apart from the union of the general employees.

[93 Cong. Rec. 6603].

Atkins and Jones & Laughlin involved militarized proprietary guards. The Congressional response to those cases, Taft-Hartley's creation of Section 9(b)(3), made no attempt to disqualify guard employees working in national security situations from the protection of the Act.

Quite to the contrary, the post-Taft-Hartley Board continued to recognize, as it did during World War II, that both employees and employers who provide products and services related to our nation's defense are particularly in need of the protection of the

Act. The provisions of the statute enhance labor stability, making it less likely that a labor dispute will disrupt national security operations.

The Board's decision in Tiachert's Inc., 107 NLRB 779 (1954) was issued in the midst of a heightened concern for the "Communist Threat." In that setting, the Board recognized the value of asserting jurisdiction over defense-related industries because the Act provides mechanism for enhancing industrial stability and deterring labor strife. It stated:

> We recognize of course that Federal intervention in labor disputes which have a real impact on national defense is especially warranted . . .

[107 NLRB at 781].

Similarly, in Maytag Aircraft Corp., 110 NLRB 594 (1954), the Board stated that it is precisely because of the potential effect upon the national interest that the Board should exercise jurisdiction over defense-related contracts:

> Where, as here, the national defense is concerned, we have stated previously that "we recognize of course that Federal intervention in labor disputes which have a real impact on national defense is especially warranted, particularly in these times . . . We agree . . . that this Board should step into labor disputes which are substantial in character, and particularly where our national welfare is involved.

[110 NLRB at 594].

The Board has continued to assert jurisdiction over employers where national defense security concerns exists. See, e.g., Baywatch Security and Investigations, 337 NLRB No. 70 (05/07/02) (security services at Army ammunition plant); Old Dominion Security, 289 NLRB 81 (1998) (security services for United States Coast Guard); Champlain Security Services, 243 NLRB 755 (1979) (security services for United States Navy); Ricks Construction Co., 259 NLRB 295 (1981) (Board jurisdiction based upon

substantial impact on national defense at naval petroleum reserve). Substantial impact on the national defense is sufficient to create Board jurisdiction, irrespective of whether the employer's operations satisfy any other jurisdictional standard. Geronimo Service Co., 129 NLRB 366 (1960); Ready Mixed Concrete & Materials, 122 NLRB 318 (1958).

For over 50 years, the Board's jurisdiction over national defense operations by private employers has been one area of labor law that has been wholly predictable. A clear and consistent line of cases has been established that has transcended the political composition of the Board and has been left untouched by the Congress. There appears to be little reason for changing a policy that has worked so well for so long.

By abandoning the divided loyalty-based proscriptions of Section 9(b)(3) in an important national security context, that of airport screener employees, the Board would be flying in the face of the current public policy trend toward greater sensitivity to conflicts of interest involving persons who serve in positions of trust, whether with respect to corporate governance, public officials, or labor disputes. Here, a brief digression about Covenant Aviation Security, 20-RC-17896, 01/27/04 RD Decision and Direction of Election [Joint Exhibit 3 in the current case], is in order.

A Board-issued certification is not a pre-requisite to collective bargaining. Collective bargaining agreements have been negotiated and executed without any Board involvement, through "voluntary" recognition. Such a collective bargaining agreement, with effective dates of November 1, 2002 through November 16, 2004, existed between TSA contractor Covenant Aviation Security, LLC and Service

Employees International Union Local 790,[3] covering airport screeners and lead screeners at San Francisco International Airport. However, that labor agreement was the subject of a Board unfair labor practice charge in Case 20-CA-31155-1. The charge resulted in a settlement dated Jun 11, 2003, which inter alia required Covenant Aviation to not enforce the agreement with Local 790, and to withdraw recognition from Local 790. See Jt. Exh. 3, p. 4 at note 1.

If the Board were to leave unexercised its jurisdiction over airport security screeners, then potential unfair labor practices, in connection with the representation of screener employees by unions who might achieve voluntary recognition through community or political pressure, would go completed unregulated.

Surely, the purposes stated in Section 1 of the Act would be better served by the Board exercising its jurisdiction to regulate security screener collective bargaining within the protections of Section 9(b)(3), rather than by being irrelevant to such bargaining. National security also would be best served by the Board enforcing the Act's standards, both with respect to protecting employees' Section 7 rights and with respect to protecting employers from unlawful acts by labor organizations.

Obviously, sound exercise of the Board's discretion as to its jurisdiction would lead it to take jurisdiction in the present representative case.

III. When If It is Necessary to Exclude Employees From Collective Bargaining for Reasons of National Security, Congress Enacts Legislation Providing an Executive Branch Entity With Authority and Standards to Make Such Exclusionary Determinations, and a Labor Relations Board Has Never Been So Designated.

[3] Local 790 is directly affiliated with the Service Employees International Union, a mixed guard/non-guard union, and therefore is ineligible to be certified as the bargaining representative for guard employees, pursuant to Section 9(b)(3) of the Act.

A. Civil Service Reform Act

5 USC § 7103(b)(1), added by the Civil Service Reform Act of 1978 [CSRA], authorizes the President to exclude any agency or subdivision of any agency from the ability to bargain collectively if it has a primary function of intelligence, counterintelligence, investigative, or national security work, and application of the labor relations provisions of the CSRA cannot be applied in a manner consistent with national security requirements and considerations.[4]

Prior to enactment of the CSRA, H.R. 11280, the House-passed version of the CSRA, included exclusionary language identical to the current § 7103(b)(1), see H.R. 11280, 95th Cong. § 701 (1978)(engrossed). The language was offered as part of a substitute to the bill that was reported by the House Committee on Post Office and Civil Service. The reported bill would have allowed the Federal Labor Relations Authority [FLRA] to exclude any agency or unit from the application of the labor-management relations provisions of the bill if it had a primary function of intelligence, counterintelligence, investigative, or security work, see H.R. 11280, 95th Cong. § 701 (reported); 124 Cong. Rec. H9625-40 (daily ed 09/13/78) (substitute language, sectional analysis, and debate). Although the debate surrounding the adoption of the substitute does not explain the rationale for the change, the fact is that the President, rather than the FLRA, was authorized to exclude agencies or units from collective bargaining on the basis of national security.

---

[4] 5 USC § 7103(b)(1):
(b)(1) The president may issue an order excluding any agency or subdivision thereof from coverage under this chapter [5 USCS §§ 7101 et seq.] if the President determines that –
(A) the agency or subdivision has as a primary function intelligence, counterintelligence, investigative, or national security work and
(B) the provision of this chapter [5 USCS §§ 7101 et seq.] cannot be applied to that agency or subdivision in a manner consistent with national security requirements and considerations.

S. 2640 was the Senate-passed version of the CSRA. Although the chambers agreed to pass S. 2640 in lieu of H.R. 11280, the exclusionary language as it appeared in the House-passed version of the CSRA was incorporated without explanation into S. 2640, resulting in 5 USC § 7103(b)(1). See H. Rept. 95-1717 (1978); S. Rept. 95-1272 (1978).

B. Aviation and Transportation Security Act

In November, 2001, Congress passed the Aviation and Transportation Security Act [ATSA], PL 107-71, which created the Transportation Security Administration [TSA], a department within the Department of Transportation. In a note to 49 USC § 44935, ATSA gave broad authority to the Under Secretary of Transportation for Security. The note reads:

> Notwithstanding any other provision of law, the Under Secretary of Transportation for Security may employ, appoint, discipline, terminate, and fix the compensation, terms, and conditions of employment of Federal service for such a number of individuals as the Under Secretary determines to be necessary to carry out the screening functions of the Under Secretary under section 44901 of title 49, United States Code. The Under Secretary shall establish levels of compensation and other benefits for individuals so employed.

[P.L. 107-71, Title I, § 111(d), 115 Stat 620].

The above-quoted note has been interpreted by the Federal Labor Relations Authority to give to the Under Secretary unreviewable authority to exclude federally employed security screeners from collective bargaining. United States Department of Homeland Security, 59 FLRA 423, 2003 WL 22669101 (FLRA), pp.6-13; see American Federation of Government Employees v. Loy, 367 F3d 932, 934-935 (DC Cir 2004).

C. Rationale

The histories provided by the CSRA and the ATSA demonstrate that the exclusion of employees from collective bargaining for national security purposes has not been left to the discretion of labor agencies. Rather, Congress has designated specific Executive Branch entities, other than labor agencies, to determine which otherwise eligible employees need to be denied collective bargaining rights for reason of national security. The Board has never been thus designated by Congress. It would be a mistaken exercise of discretion for the Board to exclude privately employed security screeners from collective bargaining without any specific statutory authority to do so.

IV. Conclusion

For the reasons stated above and by Member Liebman, see Firstline, *supra* (Member Liebman, dissenting), the Board should exercise jurisdiction in this case.

Respectfully submitted,

Gregory, Moore, Jeakle, Heinen & Brooks, P.C.

By: 

Mark L. Heinen

65 Cadillac Square – Suite 3727
Detroit, Michigan 48226-2893
Telephone: (313) 964-5600
Fax: (313) 964-2125
Attorneys for Petitioner SPFPA

Date: August 3, 2005

Certificate of Service

I certify that on August 3, 2005, I served copies of this brief by first class mail upon:

D. Michael McConnell
Regional Director, Region 17
National Labor Relations Board
8600 Farley Street, Suite 100
Overland, KS 66212

William G. Trumpeter, Esq.
Miller & Martin PLLC
Suite 1000, Volunteer Building
832 Georgia Avenue
Chattanooga, TN 37402

Stephen P. Schuster, Esq.
Constangy, Brooks & Smith, LLC
2600 Grand Boulevard – Suite 300
Kansas City, MO 64108

Mark L. Heinen